No. 97-844

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Supreme Court of the United States

OCTOBER TERM, 1997

DISTRICT ATTORNEY OF BUCKS COUNTY; MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of the State Correctional Institution at Greene; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview,

Petitioners,

v.

CLIFFORD SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a federal court can grant habeas relief to a defendant who was deprived of his constitutional right to have a jury determine each element of a charged offense beyond a reasonable doubt.

2. Whether a jury instruction that violates a defendant's right to have a jury determine each element of a charged offense beyond a reasonable doubt is harmless error where the prosecutor argued that the jury should rely upon the unconstitutional instruction, and the only direct evidence of the element was provided by accomplices who were not present.

PARTIES TO THE PROCEEDING

Respondent in this matter is Clifford Smith, an inmate sentenced to death and currently held on death row in the Commonwealth of Pennsylvania.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES..... iv

STATEMENT OF THE CASE 1

ARGUMENT IN OPPOSITION 3

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS RELIED UPON ESTABLISHED SUPREME COURT PRECEDENT IN FINDING THAT THE JURY INSTRUCTIONS VIOLATED RESPONDENT'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND PROPERLY FOUND THAT SUCH VIOLATION WAS NOT HARMLESS ERROR..... 3

I. THE COURT OF APPEALS CORRECTLY FOUND THAT JURY INSTRUCTIONS WHICH RELIEVED THE COMMONWEALTH OF ITS BURDEN TO PROVE THE SPECIFIC INTENT ELEMENT OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT VIOLATED ESTABLISHED CONSTITUTIONAL LAW..... 3

II. THE COURT OF APPEALS' HARMLESS ERROR ANALYSIS DOES NOT CONFLICT WITH OTHER CIRCUIT COURT OPINIONS, IS SOUNDLY BASED ON ESTABLISHED SUPREME COURT PRECEDENT, AND IS UNWORTHY OF REVIEW BY THIS COURT 7

CONCLUSION..... 12

TABLE OF AUTHORITIES

CASES Page

Brecht v. Abrahamson, 507 U.S. 619 (1993) 8,10
Caldwell v. Mississippi, 472 U.S. 320 (1985) 1
California v. Ramos, 463 U.S. 992 (1983) 1
California v. Roy, ___ U.S. ___, 117 S. Ct. 337 (1996) 8,10
Carella v. California, 491 U.S. 263 (1989) 4,5,6,7
Commonwealth v. Bachert, 453 A.2d 931 (Pa. 1982) 2,4,6
Commonwealth v. Bricker, 581 A.2d 147 (Pa. 1990) 8
Commonwealth v. Gwatley, 442 A.2d 236 (Pa. 1982) 8
Commonwealth v. Huffman, 638 A.2d 961 (Pa. 1994) 2,4,6
Commonwealth v. La, 640 A.2d 1336 (Pa. Super. Ct. 1994) 9
Commonwealth v. Mobley, 359 A.2d 367 (Pa. 1976) 9
Commonwealth v. Nunez, 459 A.2d 376 (Pa. Super. Ct. 1983) 9
Commonwealth v. Presley, 411 A.2d 760 (Pa. Super. Ct. 1979) 9
Commonwealth v. Roux, 350 A.2d 867 (Pa. 1976) 8
Commonwealth v. Yates, 357 A.2d 134 (Pa. 1976) 8
Francis v. Franklin, 471 U.S. 307 (1985) 4,5,6,7
Granberry v. Greer, 481 U.S. 129 (1987) 4
Mullaney v. Wilbur, 421 U.S. 684 (1975) 4,5
O'Neal v. McAninch, 513 U.S. 432 (1995) 8,10
Osborne v. Ohio, 495 U.S. 103 (1990) 5
Sandstrom v. Montana, 442 U.S. 510 (1979) 4,5,6,7
Smith v. Horn, 120 F.3d 400 (3d Cir. 1997) 2,3,4,5,6,7,9,10
Sullivan v. Louisiana, 508 U.S. 275 (1993) 4,5

TABLE OF AUTHORITIES—*(Continued)*

CASES Page

Trest v. Cain, __ U.S. ___, 118 S. Ct. 478 (1997) 4

United States v. Gaudin, 515 U.S. 506 (1995) 5

In re Winship, 397 U.S. 358 (1970) 1,3,4,5

STATUTE

18 Pa. Cons. Stat. Ann. § 2502(a) (West 1983)..... 2,5

BRIEF IN OPPOSITION

Respondent Clifford Smith prays that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case arises from a robbery and shooting in 1983 at the Park-Woodburne Apothecary in Bensalem Township, Bucks County, Pennsylvania. Clifford Smith ("Respondent" or "Mr. Smith") and Roland Alston were involved in a robbery during which the pharmacist, Richard Sharp, was shot and killed. Mr. Smith was convicted of first degree murder in November 1983 and sentenced to death. Mr. Smith, now on death row in Pennsylvania, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania on October 2, 1995. On February 22, 1996, the district court ordered the Writ granted with respect to Mr. Smith's death sentence pending resentencing in state court.

The district court ruled that the prosecutor impermissibly misled the jury regarding Mr. Smith's eligibility for parole and misinformed the jury about its responsibility for determining whether Respondent should be executed in violation of *Caldwell v. Mississippi,* 472 U.S. 320 (1985), and *California v. Ramos,* 463 U.S. 992 (1983).[1] The district court denied relief on the other claims raised by the Petition, including the claim that the trial court's jury instructions unconstitutionally relieved the Commonwealth of Pennsylvania ("Commonwealth") of its burden to prove an essential element of the charged offense beyond a reasonable doubt in violation of the principles announced in *In re Winship,* 397 U.S. 510 (1970) and its progeny. The district court did not find that any procedural defenses prohibited the granting of relief on this claim,

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1. This capital sentencing error is not at issue in the current certiorari petition.

but, as the Court of Appeals found, erroneously denied relief on the merits.[2] *Smith v. Horn,* 120 F.3d 400, 403 (3d Cir. 1997).

The Commonwealth filed an appeal of the district court's Order granting a new sentencing. The district court granted Respondent a certificate of probable cause to cross appeal on the claims on which the district court had denied relief. Respondent thereafter filed a cross appeal. The Court of Appeals granted relief on Respondent's cross appeal and ordered that the Writ be granted with respect to his conviction.[3] *Id.*

The Court of Appeals held that the jury instructions at Mr. Smith's capital trial deprived Mr. Smith of his constitutional right to have a jury determine each element of first degree murder beyond a reasonable doubt. *Id.* at 414-17. In particular, the Court of Appeals found that the instructions unconstitutionally permitted the jury to find Respondent guilty of first degree murder without determining that he had specific intent as required by Pennsylvania law. *Id.* (citing 18 Pa. Cons. Stat. Ann. § 2502(a) (West 1983); *Commonwealth v. Huffman,* 638 A.2d 961, 962 (Pa. 1994); *Commonwealth v. Bachert,* 453 A.2d 931, 935 (Pa. 1982)). The Court of Appeals also noted that the prosecution specifically argued that the jury did not have to find specific intent as to Mr. Smith: "If you find that this defendant or both defendants or *either of them had the conscious purpose to take human life,* you can find as

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2. The district court summarily denied relief in two sentences: "Smith has raised several other arguments in his petition concerning both the guilt and penalty phases of his 1983 trial. These we find to be without merit." Petitioner's Appendix at 90a.

3. The Court of Appeals tailored its grant of relief to remedy the specific constitutional error that infected this trial:

> We express no opinion whether, following the grant of habeas relief, the Commonwealth may properly move to resentence Smith for any lesser included homicide (such as murder or manslaughter where specific intent is not an element of the crime). Nor do we express an opinion concerning the propriety of the Commonwealth moving to resentence Smith on the other crimes for which he was convicted along with first degree murder.

Id. at 419.

a matter of fact and as a matter of law that it's murder in the first degree." *Id.* at 404-05 (emphasis in original). The Court of Appeals accordingly found that relief was appropriate because the constitutional error was not harmless as to the first degree murder conviction. *Id.* at 419.

Subsequently, the Commonwealth filed a Petition for Rehearing In Banc, which, on August 21, 1997, the Court of Appeals denied. The Commonwealth then filed the Petition for Writ of Certiorari that is the subject of this Brief in Opposition.

ARGUMENT IN OPPOSITION

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COURT OF APPEALS RELIED UPON ESTABLISHED SUPREME COURT PRECEDENT IN FINDING THAT THE JURY INSTRUCTIONS VIOLATED RESPONDENT'S CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND PROPERLY FOUND THAT SUCH VIOLATION WAS NOT HARMLESS ERROR

I. THE COURT OF APPEALS CORRECTLY FOUND THAT JURY INSTRUCTIONS WHICH RELIEVED THE COMMONWEALTH OF ITS BURDEN TO PROVE THE SPECIFIC INTENT ELEMENT OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT VIOLATED ESTABLISHED CONSTITUTIONAL LAW

The Court of Appeals, relying upon this Court's established precedent, correctly determined that the jury instructions provided at Mr. Smith's trial relieved the Commonwealth of its burden to prove the specific intent element of first degree murder beyond a reasonable doubt in violation of *In re Winship* and its progeny. *Smith,* 120 F.3d at 415. The Court of Appeals held that the jury instructions permitted the jury to find Mr. Smith guilty of first degree murder based solely upon

the intent of his co-conspirator and, therefore, allowed the jury to convict Mr. Smith of first degree murder without finding beyond a reasonable doubt that Mr. Smith possessed the specific intent to kill. *Id.* at 416.

The Court of Appeals held that these instructions were the functional equivalent of the instructions found unconstitutional by this Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979), *Francis v. Franklin,* 471 U.S. 307 (1985), and *Carella v. California,* 491 U.S. 263 (1989), because Mr. Smith's jury was permitted to *"conclusively presume"* that Mr. Smith had the intent to kill (and thus be guilty of first degree murder) if he was *only* an accomplice to the robbery.[4] *Id.* (emphasis in original). Given the constitutional error, the Court of Appeals' decision here no more "open[s] the door to large scale federal review of state law issues" than did this Court's decisions in *Sandstrom, Franklin, Carella,* or their progeny.[5]

This Court has long held that the Due Process Clause of the Fourteenth Amendment requires that the government prove beyond a reasonable doubt each element of the offense charged against a criminal defendant. *In re Winship,* 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur,* 421 U.S. 684, 700-04 (1975); *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993); *see also*

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4. In Pennsylvania, felony murder does not constitute first degree murder but, instead, is second degree murder. Thus, a prosecutor may not use intent to rob to prove specific intent to kill in a Pennsylvania first degree murder prosecution. *Commonwealth v. Huffman,* 638 A.2d 961 (Pa. 1994); *Commonwealth v. Bachert,* 453 A.2d 931 (Pa. 1982).

5. Petitioners also belatedly make reference to an "exhaustion" defense despite having failed to raise this defense (1) in their response to the habeas corpus petition, (2) during the evidentiary hearing and oral argument before the district court, (3) in their post-evidentiary hearing brief, (4) in their main brief on appeal, (5) in their response to Mr. Smith's cross appeal brief, or (6) during oral argument before the Court of Appeals. Acknowledging its discretionary authority to raise such procedural issues *sua sponte* pursuant to *Granberry v. Greer,* 481 U.S. 129, 134 (1987), the Court of Appeals refused to place itself in the "untenable position of ferreting out possible defenses upon which the state has never sought to rely" and "dangerously close to acting as advocates for the state rather than as impartial magistrates." *Smith,* 120 F.3d at 409. By doing so, the Court of Appeals did not abuse its discretion. *See Trest v. Cain,* ___ U.S. ___, 118 S. Ct. 478, 480 (1997).

Osborne v. Ohio, 495 U.S. 103, 122-26 (1990) (reversing conviction because jury not instructed on each element of offense); *United States v. Gaudin,* 515 U.S. 506 (1995) (Fifth Amendment Due Process clause requires judge to submit each element of offense to jury). Moreover, the Court applied this principle in *Sandstrom, Franklin* and *Carella* and held that jury instructions which permit a jury to assume the existence of an essential element of the charged offense unconstitutionally relieve the government of its burden to prove each element of the offense beyond a reasonable doubt.

The Court of Appeals applied these well-established principles to this case. First, the Court of Appeals discussed the elements of first degree murder in Pennsylvania, which include that a defendant possess the specific intent to kill. *Smith,* 120 F.3d at 410 (citing 18 Pa. Cons. Stat. Ann. § 2502(a) (West 1983); *Huffman,* 638 A.2d at 962-63; *Bachert,* 453 A.2d at 935). The Court of Appeals then addressed Mr. Smith's constitutional claim and inquired "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution." 120 F.3d at 411. After careful examination of the disputed instructions, the Court of Appeals determined that a "fair reading of the jury instructions given in this case permitted the jury to convict Smith of murder in the first degree without first finding beyond a reasonable doubt that Smith intended that Sharp be killed . . . ." *Id.* Applying the principles set forth in *In re Winship, Mullaney, Sullivan, Sandstrom, Franklin, Carella, Osborne,* and *Gaudin,* the Court of Appeals held that the jury instructions relieved the Commonwealth of its burden to prove each element of the charged offense beyond a reasonable doubt. *Id.* at 414.

In its Petition, the Commonwealth distorts the Court of Appeals' opinion by asserting that the Court of Appeals converted an issue of state law into a federal due process issue which, according to the Commonwealth, is outside the jurisdiction of the Court of Appeals. Petitioners also wrongly assert that the Court of Appeals' reliance on *Sandstrom, Franklin,* and *Carella* is misplaced because these decisions involve

presumption-shifting instructions allegedly distinguishable from Mr. Smith's jury instructions. Petitioners are incorrect on each point.

The Court of Appeals applied settled constitutional law to an error that violated Mr. Smith's federal constitutional rights. Any determination of whether the Commonwealth deprived a defendant of his right to have each element of an offense proved to a jury beyond a reasonable doubt necessarily requires a court to ascertain the elements of the offense under state law. The Court of Appeals correctly found that the only issue of state law (namely, what are the elements of first degree murder in Pennsylvania) was well-settled by the Pennsylvania Supreme Court in *Bachert* and *Huffman*, a point conceded by the Commonwealth.[6] *Id.* at 411. The Court of Appeals ruled that the trial court's jury instructions did not require the jury to find, as to Mr. Smith, the specific intent to kill required in Pennsylvania to convict a defendant for first degree murder. To the contrary, Mr. Smith's jury was actually instructed by the trial court that it could find Mr. Smith guilty of first degree murder if it determined that Mr. Smith was an accomplice to the robbery. *Id.* at 412.

The Court of Appeals, therefore, ruled that Mr. Smith's jury instructions were similar to the instructions found unconstitutional in *Sandstrom*, *Franklin*, and *Carella* because the instructions permitted the jury to presume that Mr. Smith had the intent to kill, based solely on a factual determination that he was an accomplice in the robbery. *Id.* at 416. In fact, the Court of Appeals found that the instructions in this case effectively eliminated the need to find specific intent to kill. *Id.* at 414. If an instruction that shifts the prosecution's burden of proof as to an element of the offense violates the Constitution, *a fortiori*, an instruction that effectively eliminates the burden altogether must also be unconstitutional.

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6. "The Commonwealth unambiguously conceded at oral argument [that] *Huffman* and *Bachert* make clear that specific intent to commit a killing, not simply intent to commit some other crime from which a killing results, is a prerequisite to a conviction for first-degree murder in Pennsylvania." *Id.* at 411.

Despite the Commonwealth's dire predictions, the Court of Appeals' review of Mr. Smith's jury instructions does not open the door to "large scale federal review of state law issues." Rather, the authority of the federal courts to determine the constitutionality of jury instructions pursuant to the Fourteenth Amendment's Due Process Clause is independent of the state court's authority to determine error under state law. This Court in *Sandstrom* explicitly acknowledged that, although state courts may review jury instructions as to their validity under state law, state courts are "not the final authority on the interpretation which a jury could have given the instruction." 442 U.S. at 516-17.

If, as petitioners assert, the effect of the incorrect jury instructions is solely a state law issue, and not within the jurisdiction of the federal courts, then petitioners, by implication, propose that this Court overrule its decisions in *Sandstrom, Franklin, Carella,* and their progeny. Petitioners, however, do not explicitly seek such a ruling in their Petition.

The Court of Appeals had jurisdiction to determine whether Mr. Smith's jury instructions comport with established federal constitutional principles and United States Supreme Court precedent. Because the Court of Appeals' decision "follows inexorably from the Supreme Court's decisions in *Sandstrom, Franklin,* and *Carella,*" this Court should deny the Petition for Writ of Certiorari.[7] *Smith,* 120 F.3d at 416.

II. THE COURT OF APPEALS' HARMLESS ERROR ANALYSIS DOES NOT CONFLICT WITH OTHER CIRCUIT COURT OPINIONS, IS SOUNDLY BASED ON ESTABLISHED SUPREME COURT PRECEDENT, AND IS UNWORTHY OF REVIEW BY THIS COURT

Petitioners fail to identify a valid reason for this Court to review the Court of Appeals' harmless error analysis. Petitioners do not identify a Circuit Court opinion with which the Court of Appeals' opinion conflicts regarding harmless error.

7. The Court of Appeals' decision in this matter does not conflict with any decision of any other Court of Appeals.

In addition, petitioners do not argue that the Court of Appeals relied upon erroneous principles of law. Rather, petitioners claim that this Court should review the Court of Appeals' decision solely because petitioners disagree with the Court of Appeals' assessment that the constitutional violation at issue had a "substantial and injurious effect" on the verdict. Accordingly, petitioners present a fact-bound dispute that does not warrant review by this Court.

The Court of Appeals' application of the harmless error analysis set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), *O'Neal v. McAninch*, 513 U.S. 432 (1995), and *California v. Roy*, ___ U.S. ___, 117 S. Ct. 337 (1996), reaches a result with which petitioners disagree. Petitioners argue that, even if the Commonwealth committed a constitutional violation that relieved the jury of its burden to find each element of first degree murder beyond a reasonable doubt, the error was harmless because (1) the verdict of "conspiracy to commit murder" implicitly included a finding that Mr. Smith possessed the specific intent to kill, and (2) the evidence, in petitioners' view, pointed to Mr. Smith as the shooter, not his co-conspirator, Roland Alston. These arguments are incorrect both factually and legally.

Petitioners' first assertion directly conflicts with Pennsylvania authority affirming that a jury verdict of "conspiracy to commit murder" can include a finding of second and third degree murder, where specific intent to kill is not an element of the crime. *See, e.g., Commonwealth v. Bricker*, 581 A.2d 147, 152 (Pa. 1990) (noting that co-defendant plead guilty to conspiracy to commit murder and third degree murder); *Commonwealth v. Gwatley*, 442 A.2d 236, 238 (Pa. 1982) (affirming conviction for conspiracy and third degree murder; only plausible object of conspiracy was murder); *Commonwealth v. Roux*, 350 A.2d 867, 869 (Pa. 1976) (affirming second degree murder conviction and conspiracy conviction; "there was sufficient evidence presented of shared criminal intent and activity to justify the trial court's finding that Roux was part of a conspiracy to physically assault [victim]"); *Commonwealth v. Yates*, 357 A.2d 134, 135 (Pa. 1976) (affirming conviction of

conspiracy and murder in the third degree; only object of conspiracy was third degree murder); *Commonwealth v. Mobley,* 359 A.2d 367, 368 (Pa. 1976) ("[A]ppellant was part of a conspiracy to commit [third degree] murder which was formed the moment the 'Valley' gang began chasing the 'Norris Street' gang."); *Commonwealth v. La,* 640 A.2d 1336, 1345 (Pa. Super. Ct. 1994) ("Appellant asserts that he must have had a shared intent to kill before he can be convicted of conspiracy to commit murder. We disagree."); *Commonwealth v. Nunez,* 459 A.2d 376 (Pa. Super. Ct. 1983) (general conviction for conspiracy to commit murder relates only to second degree murder mental state); *Commonwealth v. Presley,* 411 A.2d 760 (Pa. Super. Ct. 1979) (same).

In those cases, the defendants were convicted of "conspiracy to commit murder" and yet, the prosecutor was not required to prove beyond a reasonable doubt that the defendant possessed the specific intent to kill. Thus, petitioners' claim that the guilty verdict of "conspiracy to commit murder" implicitly includes a factual finding that Mr. Smith harbored the specific intent to kill is legally erroneous under settled Pennsylvania law.[8]

Petitioners also assert that the evidence demonstrated that Mr. Smith was the shooter and that any unconstitutional instruction was therefore harmless. The Court of Appeals disagreed and concluded that the constitutional violation at issue — relieving the Commonwealth of its burden to prove beyond a reasonable doubt the specific intent requirement of first degree murder — had a "substantial and injurious effect or influence" on the verdict. *Smith,* 120 F.3d at 419. The Court of Appeals reached this conclusion for three reasons. First, although some evidence suggested that Mr. Smith was the shooter, the evidence was not so conclusive to require a finding that Mr. Smith was the shooter "beyond a reasonable

8. Moreover, it is not logically impossible to conspire to commit second or third degree murder. Co-conspirators can agree in a malicious manner (or in reckless disregard for human life) without specifically agreeing to kill someone. Such a conspirator can be held liable for third degree murder in Pennsylvania, but not first degree.

doubt." *Id.* at 418. Second, the improper jury instruction narrowed the jury's focus to such an extent that the Court of Appeals doubted that a reasonable juror would answer "the rather difficult question" of whether Mr. Smith killed the decedent instead of the simpler question of whether Mr. Smith or his co-conspirator killed the decedent. *Id.* at 419. Finally, the Court of Appeals noted that the prosecutor repeatedly argued to the jury that it did not matter whether Mr. Smith was the shooter: "Having repeatedly urged the jury to base its verdict on a theory predicated on a fundamental constitutional error, the Commonwealth cannot now seriously contend that the error had no 'substantial and injurious effect or influence on the verdict.'" *Id.* For these reasons, the Court of Appeals determined that the constitutional error was not harmless under the *Brecht/O'Neal/Roy* standard.

Although there was no direct evidence regarding the shooting, petitioners assert that the following circumstantial evidence proves that Mr. Smith was the shooter: (a) statements by two female accomplices who drove Mr. Smith and his co-conspirator to and from the pharmacy where the killing occurred; (b) Mr. Smith's shoes had blood on them; and (c) "ballistics evidence" purportedly showed that a firearm allegedly belonging to Mr. Alston had not been fired.

The Court of Appeals found the statements of the female accomplices less convincing because the accomplices were not present at the shooting and their credibility was questionable. *Id.* at 418. Moreover, the value of the statements was further diminished because the erroneous jury instructions made it unnecessary for the jury to consider the truthfulness of the statements. *Id.*

Second, the blood on Mr. Smith's shoes does not prove that Mr. Smith shot the decedent. The blood is circumstantial evidence only that Mr. Smith was in the pharmacy at the time the decedent was shot.

Finally, petitioners' assertion that ballistics evidence revealed that Mr. Alston's gun had not been fired lacks support in the record. Petitioners fail to cite where this supposed ballistics evidence is located in the record. FBI special agent

Gerald F. Wilkes, the only ballistics expert to testify at the trial, testified that certain cartridges had been loaded into a gun allegedly belonging to Mr. Alston, and then removed from that gun. *See* Notes of Testimony dated November 22, 1983 at 337. Other than this testimony, no other evidence was introduced regarding whether a gun belonging to Mr. Alston had been fired. For that reason, the record does not provide any "ballistics evidence," or any other evidence, that shows that Mr. Alston's gun had not been fired.

Petitioners fail to present any persuasive reason why the Court of Appeals' harmless error analysis in this case is worthy of this Court's consideration. Rather, petitioners present factual disputes – based upon either immaterial aspects of this case or erroneous constructions of the law and record – regarding the conclusions the Court of Appeals reached.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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